FILE COPY

FEB 25

Supreme Court of the United States

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., APPELLANT

VERSUS

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, APPELLEES.

APPELLEES' ARGUMENT

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitor for Appellees.

THE R. L. BRYAN CO., COLUMBIA, S. C.
2-24-32-60

Supreme Court of the United States

OCTOBER TERM, 1931

No. 504

EASTERN AIR TRANSPORT, INC., APPELLANT

VERSUS

SOUTH CAROLINA TAX COMMISSION AND W. G. QUERY, J. P. DERHAM, AND FRANK C. ROBINSON, AS MEMBERS OF SOUTH CAROLINA TAX COMMISSION, APPELLEES.

APPELLEES' ARGUMENT

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitor for Appellees.

STATEMENT

Eastern Air Transport, Inc., operates its aeroplanes into and through South Carolina and does only an interstate business. Its planes make landings at several airports in South Carolina and at such points purchase gasoline for propelling its planes so operated. All of the airports are served by improved highways of the State and counties in which the ports are located and the cost thereof is paid from funds derived from persons and corporations who pay a tax for the privilege of selling gasoline within the State.

Standard Oil Company is duly licensed to sell gasoline within South Carolina and pays a tax at the rate of six cents per gallon on all gasoline it sells within the State and six cents per gallon on all it uses in its own business in the State. This tax applies to all persons and corporations engaged in the business of selling gasoline in South Carolina. Standard Oil Company sells, at the airports in South Carolina, to Eastern Air Transport, Inc., such gasoline as it requires for the propelling of its aeroplanes in interstate commerce.

Eastern Air Transport, Inc., is not a dealer in gasoline and pays no tax to the appellees, or other state agency in South Carolina for the privilege of dealing in gasoline, nor does it pay a tax on the use of gasoline, and no demand has ever been made upon it to pay and it has never paid to any officer or agent of South Carolina any tax on gasoline whatsoever. It is true that Standard Oil Company asserts that when it makes a sale of gasoline to Eastern Air Transport, Inc., it adds to the price six cents per gallon to cover the amount of tax it is required to pay as a seller of gasoline within the State.

The Act of the Legislature places no tax upon the use of gasoline save such as a licensed dealer uses in carrying on his or its business within the State. In other words, a licensed dealer in gasoline pays a tax of six cents per gallon on all gasoline he sells and on all he uses within the State. The Act is set forth on page 4, Section 13, of the transcript of record.

Standard Oil Company is required to pay the tax no matter if it does or does not increase the price of gasoline per gallon by the amount of the tax. The tax applies upon all sales made within the State regardless of whether the purchaser is engaged in interstate or intrastate business, or whether it is used for pleasure or profit, except in case of sales made to agencies of the United States Government. It makes no difference, so far as this tax is concerned, whether Standard Oil Company adds six cents per gallon to the price of gasoline sold to Eastern Air Transport, Inc. In any event, the oil company is required to pay the six cents per gallon on all gasoline it sells and uses in its business within the State.

We think there is only one question to be decided:

Is the requirement that oil companies pay a license or occupation tax measured at the rate of six cents per gallon on gasoline sold, a direct burden on interstate commerce when gasoline is sold and delivered within the State to one who intends to and does thereafter use the gasoline to propel his or its aeroplanes used in carrying on interstate commerce?

It is admitted that when appellant purchases gasoline in South Carolina from Standard Oil Company, a licensed dealer, it intends to use the same in its aeroplanes which are engaged solely in interstate commerce. If, however, it should desire to use such gasoline otherwise, it has the power and privilege so to do, as the State does not concern itself with the disposition of gasoline after sale is made by a licensed dealer.

It is the contention of appellees that the sale of gasoline completed within the State is not a transaction in interstate commerce and it makes no difference whether at the time of the sale appellant intended to and did thereafter use the gasoline so purchased in carrying on interstate commerce. This principle, we submit, is well established by the following decisions of this Court:

Heisler v. Thomas Colliery Co., 260 U. S., 245.

Oliver Iron Co. v. Lord, 262 U. S., 172.
Hope Natural Gas Co. v. Hall, 274 U. S., 284.
American Mfg. Co. v. St. Louis, 250 U. S., 459.
Crescent Oil Co. v. Mississippi, 257 U. S., 129.
Hump Hairpin Mfg. Co. v. Emmerson, 258 U. S., 290, 42 Sup. Ct. Rep., 305-307.
See also *Central Transfer Co. v. Commercial Oil Co., et al.*, 45 Fed. Rep., 2d., 400.
Diamond Match Co. v. Ontonagon, 188 U. S., 82, 23 Sup. Ct. Rep., 266.

Referring to a sales tax on gasoline, the Supreme Court of New Mexico said:

> "Here, we have a tax not directed at or discriminating against interstate commerce; not directly imposed upon it or those engaged in it; affecting it only as any tax must burden any commerce. It is not exacted as the price or condition of doing business in that state. The burden on interstate commerce does not result from the statute itself, but from the situation of appellee and the exigencies of its business. We think that such a tax is within the power of the State and not regulatory of, and only incidentally burdensome to, interstate commerce."
>
> *Transcontinental and Western Air, Inc., v. Lujan, Comptroller State of New Mexico*, opinion rendered Dec. 21, 1931. See The United States Daily, Dec. 29, 1931, page 6, column 1.

Error is assigned because the District Court held that "the upkeep of such roads leading to the cities near which its airports are located facilitates its business and increases its patronage" and states there is no evidence in the record to sustain such finding.

In response to this exception, reference is craved to pages 28 and 29 of the transcript of record wherein is set forth in detail the improved highways that serve the airports at which appellant lands its planes. These roads are, with the exception of such as lie within the corporate limits of the cities near the airports, built and maintained by the expenditure of the gasoline

tax. The District Court was not in error when it found that such roads facilitated plaintiff's business and increased its patronage. This is patent. Certainly plaintiff would have no business and no patronage whatsoever if there were no roads leading to its landing places. Besides, this was in reference to plaintiff's allegation that it received no benefit from the tax (T. page 9, Section 26).

Other assignments of error are generally to the effect that the District Court should have found that the tax in question was upon the use of gasoline.

We think a casual reading of the Act, together with the affidavit of W. G. Query, chairman of South Carolina Tax Commission (Transcript of record, pages 24-27, inclusive), will make it clearly appear that the tax on gasoline sold by Standard Oil Company to Eastern Air Transport, Inc., is not a tax on the use of gasoline, but is a tax on Standard Oil Company for the privilege of selling gasoline to its customers within the State. It is true appellant alleges, paragraph 17 bill of complaint (Transcript of Record, page 8), that the tax of six cents per gallon on gasoline is paid by it to the oil company from which it buys gasoline, and that the oil company collects the tax as agent of the appellees, and otherwise it is endeavored to make it appear by the complaint that the tax is charged against appellant and is collected by the oil company making the sale and such oil company as collecting agent delivers it to the appellees, who are agents of the State of South Carolina.

The Act, as quoted in the bill of complaint (Transcript, pages 4-7), shows that such statement is incorrect as a matter of law, besides the affidavit of J. C. King (Transcript, pages 14 and 15), offered by appellant, shows:

> "That on account of the South Carolina gasoline tax the sum of six cents per gallon is added to the price of all gasoline sold by Standard Oil Company of New Jersey in South Carolina. . . ."

And further:

> "That Standard Oil Company of New Jersey would not sell gasoline in South Carolina to Eastern Air Transport,

Inc., or to any other purchaser, unless the additional sum of six cents per gallon was paid to cover the South Carolina gasoline tax."

The affidavit of W. G. Query, chairman of South Carolina Tax Commission, transcript, page 23, states:

"That Eastern Air Transport, Inc., has not applied for, nor has it been issued a license to deal in gasoline or otherwise dispose of gasoline within the State of South Carolina. That Eastern Air Transport, Inc., has paid no tax whatsoever to South Carolina Tax Commission and that any allegation in the bill of complaint herein which may allege directly or by inference that complainant has paid any tax to the Tax Commission or to any agent of the Tax Commission for the privilege of using gasoline in its aeroplanes or otherwise is without foundation in either law or in fact."

See also affidavit of W. G. Query, transcript, page 25, and the first separate defense set up in the verified answer, transcript, page 22.

Therefore we say that it clearly appears by the Act of the Legislature in question and the affidavits of Mr. King and Mr. Query, there is no tax claimed against Eastern Air Transport, Inc., on account of the use of gasoline in its interstate aeroplanes.

All of which is respectfully submitted for the consideration of this honorable Court.

JOHN M. DANIEL,
Attorney General for South Carolina.

J. FRASER LYON,
Solicitor for Appellees.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 504.—October Term, 1931.

Eastern Air Transport, Inc., Appellant, *vs.* South Carolina Tax Commission and W. G. Query, J. P. Derham, and Frank C. Robinson.	Appeal from the District Court of the United States for the Eastern District of South Carolina.

[March 14, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought to restrain the collection of a tax, imposed by the State of South Carolina, of six cents a gallon with respect to gasoline purchased by complainant in that State and used by complainant in interstate commerce. The complainant charged that the State Act placed a direct burden upon interstate commerce and hence was repugnant to the commerce clause of the Federal Constitution. Art. 1, sec. 8. The District Court, composed of three judges as required by statute, denied an interlocutory injunction (52 Fed. (2d) 456) and the complainant appeals to this Court. Jud. Code, sec. 266; U. S. C., Tit. 28, sec. 380.

From the findings of the District Court it appears that the complainant is a Delaware corporation operating, in interstate commerce, air transport lines across the State of South Carolina; that its planes make regular stops at various points in the State but do not carry freight or passengers between such points, and practically its entire business is interstate in character; that it purchases gasoline in South Carolina for the use of its planes and that the seller adds to the price the amount of the State gasoline tax which the seller is required to pay under the Act in question, and thus complainant has to pay six cents a gallon more than it otherwise would, the excess amounting to about $5,000 a year.

The tax is described in the statute[1] as a license tax which, as applied in the instant case against the dealer, is for the privilege of carrying on the business of selling gasoline within the State. The tax is thus imposed upon the seller and the sales in question are intrastate sales. The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. *Gregg Dyeing Company* v. *Query*, Supreme Court of South Carolina, decided April 13, 1931. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold,[2] its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce.[3] "It is elementary", said the Court in *New Jersey Telephone Company* v. *Tax Board*, 280 U. S. 338, 346, "that a State may tax property used to carry on interstate commerce." Treating the tax as an excise tax upon

---

[1]Act of February 23, 1922, as amended (South Carolina Acts, 1922, pp. 835-838; 1929, pp. 107-112). Section 1 provides: "That every oil company, person, firm or corporation doing domestic or intra-state business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitute therefor, sold, consigned, used, shipped or distributed for the purpose of sale within the State. . . ."

[2]Brown v. Maryland, 12 Wheat. 419, 444; Welton v. Missouri, 91 U. S. 275, 278; Kehrer v. Stewart, 197 U. S. 60, 65.

[3]Coe v. Errol, 116 U. S. 517, 525; Adams Express Co. v. Ohio, 165 U. S. 194, 220; 166 U. S. 185, 218; Galveston, Harrisburg & San Antonio Rwy. Co. v. Texas, 210 U. S. 217, 227; Wells, Fargo & Co. v. Nevada, 248 U. S. 165, 167; Heisler v. Thomas Colliery Company, 260 U. S. 245, 259; Sonneborn Bros. v. Cureton, 262 U. S. 506, 509, 515; New Jersey Telephone Co. v. Tax Board, 280 U. S. 338, 346; Superior Oil Co. v. Mississippi, 280 U. S. 390, 395.

the sales[4] does not change the result in the instant case, as the sales are still purely intrastate transactions. *Superior Oil Company* v. *Mississippi*, 280 U. S. 390, 395. Undoubtedly, purchases of goods within a State may form part of transactions in interstate commerce and hence be entitled to enjoy a corresponding immunity.[5] But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

In *Helson* v. *Kentucky*, 279 U. S. 245, upon which the appellant relies, the tax was laid by Kentucky with respect to gasoline purchased by the plaintiffs in error in Illinois and used within Kentucky in the operation of a ferry boat on the Ohio River between the two States. The Court found that the tax was laid directly upon the *use* of the gasoline in interstate transportation. The Court said that "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.*, p. 252. Such a tax is manifestly different from a general property tax or a tax upon purely local sales.

Decree affirmed.

---

[4]Panhandle Oil Co. v. Knox, 277 U. S. 218, 222; Indian Motocycle Co. v. United States, 283 U. S. 570, 574, 575.

[5]Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282, 290, 291; Lemke v. Farmers Grain Co., 258 U. S. 50; Stafford v. Wallace, 258 U. S. 495, 516; Shafer v. Farmers Grain Co., 268 U. S. 189, 198.